

**Before the
Federal Communications Commission
Washington, D.C. 20554**

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**FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY**

**In the Matter of)
)
Section 257 Proceeding to)
Identify and Eliminate)
Market Entry Barriers)
for Small Businesses)**

DOCKET FILE COPY ORIGINAL

GN Docket No. 96-113

**Comments of the
Office of Communication
of the United Church of Christ
and
Minority Media and Telecommunications Council**

Of Counsel

**David Honig
Minority Media and
Telecommunications Council**

Counsel

**Kofi A. Ofori
Office of Communication
United Church of Christ
2000 M Street, N.W.
Suite 400
Washington, D.C. 20036
(202) 331-4265**

August 22, 1996

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Summary

As the Notice of Inquiry correctly notes, "small businesses currently constitute only a small portion of telecommunication companies." In the cellular industry, for example, ten companies control 86 percent of the market. In 50 cellular markets where there are one million or more subscribers, 95 percent of the market is controlled by nine of these ten companies. Market concentration in the cellular industry in many ways mirrors the pattern of consolidation that has been rapidly taking place in the broadcast and cable TV industries.

The only way that small, minority, and female-owned businesses can successfully compete in such a hostile environment is through access to large pools of capital and by forming alliances with major players. Assisting small businesses in these areas is precisely what the Telecommunications Development Fund was created to do.

The mandate of the Fund is to provide loans and loan guarantees to small businesses as well as to provide technical assistance and market research. The Fund, however, only received minor mention in the Notice, and the Commission, to date, has done no more than appoint two of its board of directors.

If fully capitalized to meet the needs of small businesses, the Fund could provide a viable alternative to the onerous terms and conditions that are presently available in the financial markets (Section III, C). Commenters strongly recommend that the Commission examine ways in which to require capital contributions from major competitors in markets where concentration of ownership is a problem. The State of Tennessee has already established a small businesses assistance program funded by all the competitors in that state. The Commission can examine the Tennessee model to determine how it can use a mechanism similar to the universal service fund to assess contributions in a fair and equitable manner.

Finally, the Commission should revise EEO enforcement for the common carrier industry. In many instances, the Commission has acknowledged that management experience is an important stepping stone to entrepreneurship. Yet, the Commission has done nothing more than store the Annual Employment Reports collected from common carriers for the past 25 years; the most recent years are stored in unorganized boxes.

The Commission must immediately adopt an 21st century EEO enforcement policy for common carriers. As a part of that policy the Commission must revise the job categories contained in Form 395 in order to accurately determine the numbers of minorities and women in decision-making positions and monitor companies for executive training afforded women and

ii

minorities.

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I. Introduction.

The Office of Communication of the United Church of Christ ("Office of Communication"), and the Minority Media and Telecommunications Council ("MMTC"), (collectively "Commenters"), respectfully submit the following Comments in response to the Commission's Notice of Inquiry, (FCC 96-216, released May 21, 1996, ("NOI")) concerning the identification and elimination of market entry barriers.

The organizations submitting these Comments are well known to the Commission. The Office of Communication has advocated on behalf of those disenfranchised from the electronic media for the past 30 years. On numerous occasions the Office of Communication has submitted comments concerning EEO and the ability of minority and female entrepreneurs to compete in the communication marketplace.

Likewise, MMTC, which is governed by telecommunication experts who have advocated on behalf of women and minorities for many years, has been a stalwart advocate in proceedings involving EEO and minority and female

entrepreneurs.

Then, as now, these two organizations urge the Commission to create an even playing field that will permit women and minorities have their opinions and viewpoints reflected in the marketplace of ideas.

II. Employment Barriers to Market Entry

A. The Commission has Created its Own Market Entry Barrier by Failing to Aggressively Enforce EEO in the Common Carrier Industry.

In a 1994 report to Congress,¹ the Commission provided statistical data concerning employment trends in the cable TV and broadcast industries. Conspicuously absent from the Report were employment data about common carriers. Despite having asserted that equal employment opportunity advances the goal of ownership by women and minorities,² the Commission has never examined over 25 years of annual employment reports filed by an industry that is projected to have the greatest growth in terms of emerging technology and economic opportunity.

The Commission's Report acknowledged that, "[the nation is] on the brink of a huge and dramatic shift in our telecommunications infrastructure" and that "the current EEO enforcement and regulatory structure [which] focuses mainly on broadcasters and cable television operators" is out of step with the convergence to digital technology.³

¹. In the Matter of Implementation of Commission's Equal Employment Opportunity Rules, 9 FCC Rcd 2047 (1994) ("Report" or "1994 Report"), paras. 35 - 38.

². In addition to long-standing Commission policies that favor experience in upper management as a prerequisite to ownership, a number of other studies link the ability to raise capital with educational background and employment experience. A report on capital formation by the National Telecommunications and Information Administration cited two studies that concluded that discrimination in bank and venture capital financing can be mitigated by, among other things, "significant management experience". "Capital Formation and Investment in Minority Business Enterprises in the Telecommunications Industries", (NTIA) (April 1955) at 16.

³. 1994 Report, paras. 90 and 91. The Report also stated that,

Expansion of our EEO policies may be warranted in order to achieve regulatory parity and fairness in the enforcement of

The Report further stated that,

[P]rojected growth in employment in telecommunications... reinforces the need to reexamine our EEO policies to ensure that women and minorities are full participants in the overall telecommunications sector, especially in management positions which are stepping stones to ownership.⁴

Two years have now lapsed since the Report was submitted, and the Commission has not reexamined its EEO policies⁵, much less analyzed over two decades of employment data.⁶ The consequences are dire with respect to the present proceeding.

The NOI seeks information about barriers to market entry concerning minorities and women. Yet, the Commission has created its own barrier to obtaining critical information about employment practices that may have hindered the ability of women and minorities to become owners of communication enterprises.⁷ By failing to deliver on its promise to maintain an

the Commission's EEO rules. Such parity may be justified given the convergence of telecommunication technologies, which increasingly will subordinate the importance of the means of delivery of telecommunication services to the actual technologies and services provided to the public." id. Para. 92.

⁴. id. para. 94.

⁵. The Enforcement Branch of the Common Carrier Bureau has been charged with EEO oversight with regard to common carriers.

⁶. Pursuant to Commission rules, (Common Carrier Employment Practices, 24 FCC 2d 725 (1970) ("Common Carrier EEO Order")), Annual Employment Reports have been filed with the Enforcement Division of the Common Carrier Bureau since 1971. Reports filed through 1994 are located in organized filing cabinets. Reports filed for 1995 and 1996 are located in *unorganized boxes scattered on the floor*. Interview with Jeff Hertz, General Attorney, Common Carrier Bureau on August 13, 1996.

⁷. In its CMRS Third Report and Order, the Commission noted that EEO rules are appropriate for commercial mobile radio service because employment "experience, will, in turn, enable [women and minorities] to more easily to become owners of communications enterprises." CMRS Third Report and Order, 9 FCC Rcd 7988, 8097 - 8098 (1994).

up-to-date computerized database⁸ - not to mention establish an aggressive EEO program⁹ - the Commission has been a partner in the establishment of barriers to ownership by women and minorities.

As recently as 1994, the Office of Communication, MMTC, and others admonished the Commission for failing to reform its EEO oversight. Specifically, it was brought to the Commission's attention that the Annual Employment Report (Form 395) should be revised to better ascertain exactly how many minorities and women hold positions in upper management.

According to industry sources,

[T]he telephone industry traditionally has seven layers of management. Employment figures for these seven layers are consolidated into the manager and official job category for FCC reporting purposes.

Consequently, it is impossible to accurately ascertain the number of minorities and women in top management.

Comments of the League of Latin American Citizens et al, 1994 Report, MM Docket 94-34, June 14, 1994 at 5. (footnote omitted).

The 1996 employment report of Southwestern Bell Telephone ("SWBT") provides a good illustration of the shortcoming of Form 395.¹⁰ SWBT has 10,037 "managers and officials",¹¹ accounting for a fifth of its total workforce. According to SWBT, 10 percent, or 1,043, of its "managers and officials" are African Americans.

What the report does not reveal is that of those 1,043 employees only two

⁸. Twenty-five years ago the Commission said, "Our Annual employment reports are designed to be subdivided into computerized data which can then be programmed for retrieval, to provide a variety of "profile" statistics regarding utilization of minority group and female employees within each company of the industry as a whole....[Computerized data] will also provide ready access to the information contained in these forms and allow ease of data storage for cumulative purposes. "Common Carrier EEO Order, at para. 6.

⁹. According to Enforcement Division staff the Common Carrier Bureau does not have a written EEO mission statement. Interview with Jeff Hertz, General Attorney, Common Carrier Bureau on August 13, 1996.

¹⁰. Annual Employment Report Form 395, filed May, 15, 1996 by Southwestern Bell Telephone.

¹¹. Form 395 contains seven job categories. The category of "managers and officials" comprises the highest job category.

African Americans serve at the sixth level of management (just below president and senior vice president), one is employed at the fifth level, and fewer than five African Americans serve at the fourth level of management.¹² The fourth through seventh levels of management comprise the most important decision-making positions at SWBT.

The report also does not indicate the absence of any meaningful numbers of African Americans in SWBT's emerging technology subsidiaries. For example, there are no African-Americans in the international division and only one at the fourth level of management of the wireless division.¹³ It is in these newly created divisions that the emerging technologies are being deployed, however, minorities are not being afforded any meaningful employment experience in these divisions.

Interviews with several Regional Bell Operating Company ("RBOC") executives indicate that the entrepreneurial pursuits of most minorities subsequent to their corporate careers are in areas other than telecommunications (e.g., fast-food franchises). Non-minorities, on the other hand, tend to find consulting positions with other high-tech companies or actually start their own high-tech company, especially if previous corporate experience has afforded them contacts with upper level management in other companies. This anecdotal information should be followed up by more in-depth research by the Commission to determine if the pattern of employment practices by the RBOC's is repeated throughout the common carrier industry.

B. The Commission's EEO Streamlining Proceeding Threatens to Cut Off an Important Management Experience Pipeline for Minorities and Women.

In a related proceeding, the Commission is proposing to "streamline" its broadcast EEO regulations by exempting stations with 15 or fewer employees from full regulation.¹⁴ Presently, 4,239 stations with fewer than five employees are exempt. By increasing the number to 15, the Commission believes it would be exempting an additional 3,999 stations - nearly doubling the number of

¹². Interview with Regional Bell Operating Company executive on August 13, 1996.

¹³. id.

¹⁴. In the Matter of Streamlining Broadcast EEO Rules and Policies, MM Docket 96-16, February 16, 1996, para. 21.

exempt stations from 32 percent to 62 percent.¹⁵ If 62 percent of the broadcast licensees are exempted from full EEO oversight, the Commission will be effectively cutting off the most important management experience pipeline available to minorities and women.

In the broadcast industry, jobs at stations in large markets are routinely made available to applicants who have developed their skills at smaller stations. Therefore, if small stations are no longer accountable for discrimination - in effect, what the Commission is proposing - only white males will be afforded the opportunity to qualify for higher paying and more influential positions at the major stations.

Efforts by the Commission to "streamline" broadcast EEO regulation will ultimately create another barrier to market entry. Nearly every minority and woman who has been fortunate enough to become a broadcast owner began his or her career within the industry, developing experience in marketing and business management before pursuing an entrepreneurial route. It has already been determined that the ability to acquire capital is significantly determined by an applicant's experience with broadcast management.¹⁶ The Commission now proposes to undermine the ability of minorities and women to obtain experience by "streamlining" broadcast EEO.

C. Eliminating Employment Barriers to Market Entry

Several steps should be taken to eliminate employment practices that hinder the ability of women and minorities to obtain the management experience that can prepare them for entrepreneurship.

First, the Commission should revise the job categories of Form 395 in order to ascertain the exact number of women and minorities that are employed at the seven discrete levels of management in the common carrier industry.

Second, the Commission should promote and monitor executive level training for minorities and women. This can be easily accomplished by revising Form 395.

Third, the Commission should develop a computerized database for the information contained in Form 395 in order to evaluate employment practices throughout the industry and within specific companies.

Finally, the Common Carrier Enforcement Division should solicit advice

¹⁵. id. see note 34.

¹⁶. Note 2, *supra*.

from the public interest community concerning its EEO mission. The Division should also employ sufficient staff to conduct field investigations to ensure compliance with rules and policies.

With respect to broadcast EEO, the Commission should abandon its proposal to exempt small broadcasters from full EEO oversight. Commenters are filing separate recommendations in the EEO Streamlining proceeding which are incorporated herein by reference.

III. Capital Formation Barriers to Market Entry.

A. For Many Years the Commission's Broadcast Financial Qualification Standards Served to Bar Market Entry.

The Commission removed a significant barrier to market entry in 1981 when it repealed the financial qualification standard enunciated in its Ultravision Broadcasting decision.¹⁷ For 16 years, applicants for new broadcast licenses as well as station transfers and assignments had to demonstrate their financial ability to meet all fixed costs and operating expenses for the period of one year.¹⁸ The Commission acknowledged that the Ultravision test constituted a bar to minority ownership when it revised the test to a three month period.

The Ultravision standard conflicts with Commission policies favoring minority ownership and diversity because its stringency may inhibit potential applicants from seeking broadcast licenses.

Financial Qualifications Standard, 87 FCC 2d 200, 201 (1981).

By the time minorities and women were finally able to enter the market under the current three month standard, 99 percent of the major FM, AM and TV stations had been granted to affluent - mainly white - entrepreneurs for free. By 1981, stations in the major markets could only be acquired through license purchases. In effect, the Ultravision decision prevented small - mainly minority - entrepreneurs from acquiring licenses and provided a head-start for

¹⁷. Ultravision Broadcast Company, 1 FCC 2d 545 (1965).

¹⁸. Under the Ultravision rule, an applicant had to demonstrate the ability to meet all obligations for the period of one year either without income or by a "convincing evidentiary showing" that available funds will be supplemented by sufficient revenue. Ultravision at 547.

non-minorities who have established themselves as today's large group owners.¹⁹

B. Local Multiple Ownership Rules are Forcing Small and Minority Competitors to Either Sell their Interests or Compete in an Uneven Playing Field.

The rapid acceleration in market consolidation during 1996 has been generally attributed to the 1996 Telecommunications Act, which eliminated the restrictions on the number of television and radio stations that can be owned by a single entity.²⁰ More significant is the effect that the new law has had upon ownership in the local marketplace.

The 1996 Act permits up to eight radio stations in a local market to be owned by a single entity, provided there are 45 or more competing radio stations in the market.²¹ Many group owners seeking to expand their share of the local market have been aided, not only by the new law, but by Commission's regulations as well.

A recent article in Radio World²² provides an example of how a single entity can own seven of eight stations licensed to a single community due, in large part, to the Commission's definition of "local market". Under the Commission's definition, the Philadelphia and Trenton communities are treated as one market even though they are located 30 to 40 miles apart.²³ Philadelphia's 22 stations are attributed to be part of Trenton market; thus, the latter community is considered to have 30 radio stations even though only eight

¹⁹. For other examples of how the Commission ratified and validated discrimination by its licensees, see Comments of MMTC, MM Docket 94-149, May 17, 1995, herein incorporated by reference.

²⁰. Telecommunications Act of 1996, ("1996 Act"). Section 202(c) limits the national audience reach of a television group owner to 35 percent.

²¹. For Commission local radio regulations, see 47 C.F.R. 73.3555(a)(1). Television local ownership regulations will be amended by a rulemaking yet to be released.

²², Harry Cole, "Redefining Radio 'Markets'", Radio World, August 7, 1996.

²³. For multiple ownership purposes the FCC defines a market as one in which the city-grade contours of various stations overlap. The fact that the stations are licensed to discrete and distant communities is irrelevant.

stations are licensed to Trenton.

The 1996 Act permits a single entity to own up to seven stations in a market with 30 stations. Thus, if a Trenton licensee desired to expand their market share, it could acquire up to seven of Trenton's eight radio outlets, provided not more than 4 of them are the same service, AM or FM.

With respect to minority and women-owned stations this policy may seem to be benign, since anyone can take advantage of the new rules.²⁴ However, as we will see in the next section, such entrepreneurs are handicapped in their ability to obtain expansion capital and therefore will become the victims, rather than the survivors, of buy-outs.

C. Onerous Terms and Conditions Prevent Small and Minority Competitors from Entering and Expanding in the Marketplace.

When a new market entrant seeks financing for his or her first station purchase, it is almost impossible to obtain terms and conditions comparable to established owners. According to one minority female owner, her attempts to obtain debt financing for her first station were totally rejected by a bank that routinely lends to the broadcast industry. Moreover, as she presently seeks to expand her holdings from two to three stations in the same market, the same bank told her that she must be in multiple markets in order to get suitable terms.²⁵

Faced with such circumstances, minority and small entrepreneurs are forced to accept terms and conditions that, in the long run, cripple their ability to compete and/or dilute their equity interest. An example of the former is a loan for a nominal amount that included a so-called "success fee" entitling the lender to a \$600,000 payment at the end of the loan term.²⁶

Warrants issued by venture capitalists often contain reversionary clauses that require the owners to relinquish up to 30 to 40 percent of the company to

²⁴. Aside from the private sector impact, the local ownership rules impact the public sector by creating a near monopoly on the number of outlets that are available to respond to the needs and problems of the local community.

²⁵. Interview with a minority female owner of 2 FM stations presently facing competition from a major chain that owns 6 stations in her market.

²⁶. Interview with attorney that routinely handles transactions for small and minority owners.

the venture capital firm, if certain performance targets are not met. Very often the targets are impossible to attain. Performance targets may specify a certain return on investment or a certain level of advertising revenue.²⁷

The 1991 sale of WPTT-TV by Sinclair Broadcasting²⁸ to an African American²⁹ exemplifies the kind of onerous terms of conditions presented to minorities. The 7 million dollar sale of WPTT-TV was completely financed by the seller, Sinclair Broadcasting. As originally filed with the Commission, the application for assignment included a convertible subordinate debenture that permitted Sinclair to convert its interest, subject to Commission approval, into 80% of the buyer's voting common shares, thereby significantly diluting the ownership of the minority purchaser. Sinclair's right to convert the debenture was conditioned upon very dubious terms.

An investigation by Commission staff revealed that the terms of the sale imposed a loan default if there was a material adverse change in the condition of WPTT, or the prospect of repayment of interest or principal was impaired for any reason. Staff also investigated what appeared to be a limitation on the buyer's management decision-making, such as a limitation on the buyer's gross revenues.

Further examination of the sale documents revealed that Sinclair alone could access a bank account into which the buyer would place all sale receipts. Also, Sinclair could direct the buyer's debtors to pay Sinclair directly.

²⁷. Interviews with two African-American males. One is president of a radio group. The other is an attorney who routinely handles transactions. The latter related a case involving his personal attempt to acquire a station. A venture capital firm offered to supply financing only after the would-be owner obtained a licensing permit. A warrant that was part of the financing entitled the venture capital firm up to 49 percent, if certain financial targets were not achieved.

²⁸. Sinclair Broadcasting Group, Inc. is the parent company of Commercial Radio Institute, the former license-holder of WPTT-TV.

²⁹. The buyer was WPTT, Inc. (100% voting shares owned by Edwin Edwards, formerly employed by Sinclair Broadcasting Station Manager and Community Affairs Director of WPTT-TV). It was the intent of the buyer to convert WPTT-TV into a Home Shopping Network affiliate.

A Petition to Deny³⁰ filed in opposition to the sale questioned why WPTT-TV was being sold to Edwin Edwards, a former employee of the station for "no money down". The Petition also questioned why the seller-financier was requiring Mr. Edwards to manage WPTT after it was sold. The terms of sale also enabled Sinclair to retain ownership of the station's tower and studio under lease arrangements with the buyer.

According to the petitioner, the real motive for the sale of the station to a former employee was to circumvent the Commission's multiple ownership and cross-ownership rules by effectively controlling two stations in the same market - one, through outright ownership and a second by means of control over management. Sinclair intended and eventually did purchase WPGH-TV in Pittsburgh. By means of management limitations and reversion options, control would be maintained over WPTT-TV. The petitioner claimed that the intent of the buyer to convert WPTT-TV to a home shopping affiliate ensured that the station would not compete with the programming of Sinclair's newly acquired station, WPGH-TV. Perhaps stimulated by the Commission's investigation, Sinclair amended the terms of the sale, and agency approved the sale after determining that it would "serve the public interest".³¹

Seller financing is a routine method by which minorities and small competitors have entered the market. According to the law firm Crowell & Moring,³²

[Seller-financing] is often the only means by which potential broadcasters, particularly minority group members, can enter broadcasting.

Motion for Declaratory Ruling, In Re: Seller Financing, MM Docket 92-51, September 21, 1987, at 2.

Crowell & Moring and others³³ have used minority ownership as a

³⁰. Petition to Deny Application, BALCT-910117KF, March 4, 1991, filed on behalf of Mark Baseman of O'Hara Township, PA.

³¹. Letter from the Mass Media Bureau to Martin Leader, attorney for Sinclair Broadcasting, June 21, 1991.

³². Crowell & Moring counsels broadcast stations and financial institutions providing financing for broadcast stations.

³³. The Commission explored the issue of reversionary interests in broadcast licenses in a Notice of Proposed Rulemaking but never reached a decision. Investment in the Broadcast Industry, MM Docket 92-51, 7 FCC Rcd 2654 (1992).

rationale for securing seller financing with station licenses. Under such an arrangement, the ownership of the license would revert back to the seller upon a loan default, thus, permitting the resale of the license at perhaps a higher market price.

Given the proclivity of seller-financiers to use reversionary rights to avert competition, as illustrated by the WPTT-TV case, the Commission should not put additional tools into the hands of sellers that have the ability and the incentive to use them to circumvent the Commission's multiple ownership rules and policies.

D. Eliminating Financial Barriers to Market Entry

1. The Commission Should Require the Major Competitors to Contribute to a Capital Pool to be Used for Loan Guarantees, Loans, Training and Research.

Adding to the pool of money that is available to small, minority and female-owned businesses should certainly be a priority of the Commission. The 1996 Act created the Telecommunications Development Fund for the purpose of extending credit, providing financial advice and conducting research to promote access to capital and economic development.³⁴ The primary mission of the fund is to serve the interest of small businesses. Minority and female-owned businesses generally fall under this rubric.³⁵

The Fund's is funded by interest collected on deposits from competitive bidders in spectrum auctions. Estimates are that the Fund may collect 15 or more million dollars over the next few years depending upon the level of spectrum auctions. Given the capital intensity of the telecommunications industry the Fund may be undercapitalized to serve a large number of small businesses.

As a solution, the Commission should consider requiring the major competitors to contribute to the Fund as a precondition to competing in markets

³⁴. 1996 Act, Section 707.

³⁵. For the purpose of the Telecommunications Development Fund, the Act defines small business to be "businesses engaged in the telecommunications industry that have \$50,000,000 or less in annual revenues, on average of the past 3 years prior to submitting [a loan or credit] application under this section."

where there is a dearth of small, minority and female competitors. The mechanism would not be unlike the universal service fund, but its purpose would be to promote competition, employment, training, and the equitable deployment of service.

Interestingly, the purpose of the Fund dovetails with that of universal service in that the 1996 Act specifically states that the Fund is "to support universal service and promote delivery of telecommunication services to underserved rural and urban areas. Therefore to the extent that capital from the Fund is used to deliver service in underserved areas - markets that minority businesses often serve and in which they are found - the goals of both universal service and the Fund are advanced.

A model for implementing this suggestions can be found in an open competition law enacted last year by the State of Tennessee (see attachment). Section 17 of the law requires all telecommunication competitors in the aggregate to contribute 10 million dollars over a period of five years in order to fund loan guarantees and technical assistance for small and minority-owned businesses. The State's Public Service Commission is responsible for determining the contribution of individual competitors "in accordance with the process used to determine universal service support contributions...".

This model can be easily adopted to advance the goals of Section 257 of the Act - to identify and eliminate market entry barriers - by setting in motion an existing structure, the Telecommunication Development Fund.

2. The Telecommunications Development Fund can be used to Promote Partnerships and Alliances with Major Competitors.

The key to survival for small businesses in a hostile market environment is growth. In addition to access to large pools of capital, small businesses must be able to establish viable partnerships with major competitors. This could be in the form of out-sourced service contracts, parts vending, or exploring small market niches.

Again, there is a role for the Telecommunications Development Fund in the promotion of such partnerships. First, the Fund should arrange for technical assistance and market research that will prepare small businesses interested in forming alliances with major competitors. Secondly, the Fund can serve as a clearinghouse for partnering opportunities that major competitors are interested in exploring with smaller companies. The clearinghouse could also foster alliances between small businesses that can help to improve their competitive

advantage.

The Commission can play an important role by requiring major competitors to adopt a business development program and monitoring them for the number and size of contracts entered into with small, minority and female-owned businesses. Form 395 could be easily altered to facilitate this oversight.³⁶

In short, the Telecommunications Development Fund can play an important role in eliminating many of the barriers to market entry by providing an accessible pool of capital and promoting alliances with major competitors.

IV. Conclusion.

The Commission should do more than just issue a Notice of Inquiry to be followed by a policy announcement to guide its various bureaus. Section 257 calls for the Commission to prescribe regulations and that will serve the purpose of eliminating barriers to market entry. It is hoped that when the Commission reports to Congress every three years that the Commission will be able to point to results - namely, an increasing market share for small, minority and female-owned businesses as a direct result of initiatives taken by the Commission in the areas of EEO, capital formation and promoting business alliances.

Of Counsel

David Honig

Minority Media and
Telecommunications Council

Counsel



Kofi A. Ofori
(aka Anthony Pharr)
Office of Communication
United Church of Christ
2000 M Street, N.W.
Suite 400
Washington, D.C. 20036
(202) 331-4265

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³⁶. Section 16 of the Tennessee law previously referred to provides an example of a business participation plan that major competitors should adopt (see Appendix).

Appendix

PUBLIC CHAPTER NO. 408

SENATE BILL NO. 891

By Rochelle, Henry, Atchley, Rice, Hamilton

Substituted for: House Bill No. 695

By Bragg, Purcell, Jackson, Robinson, Napier, Bell, Wood, Davidson, Pinion, McAfee, Ford,
Byrd

AN ACT To amend Tennessee Code Annotated, Title 65, Chapter 4, Parts 1 and 2 and Title 65, Chapter 5, Part 2, relative to the regulation of telecommunications service providers by the Public Service Commission.

WHEREAS, It is in the public interest of Tennessee consumers to permit competition in the telecommunications services market; and

WHEREAS, Competition among providers should be made fair by requiring that all regulation be applied impartially and without discrimination to each; and

WHEREAS, Just and reasonable rates can be assured without use of cumbersome rate base-rate of return methods; and

WHEREAS, Universally affordable basic telephone service should be preserved; now, therefore,

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF TENNESSEE:

SECTION 1. Tennessee Code Annotated, Title 65, Chapter 4, is amended by adding the following as a new appropriately designated section:

Section 65-4-_____. Declaration of Telecommunications Services Policy. The General Assembly declares that the policy of this state is to foster the development of an efficient, technologically advanced, statewide system of telecommunications services by permitting competition in all telecommunications services markets, and by permitting alternative forms of regulation for telecommunications services and telecommunications services providers. To that end, the regulation of telecommunications services and telecommunications services providers shall protect the interests of consumers without unreasonable prejudice or disadvantage to any telecommunications services provider; universal service shall be maintained; and, rates charged to residential customers for essential telecommunications services shall remain affordable.

SECTION 2. Tennessee Code Annotated, Section 65-4-101, is amended by adding the words and punctuation "telecommunications services," between the comma following the word "telegraph" and the words "or any other like system."

SECTION 3. Tennessee Code Annotated, Section 65-4-101, is amended by adding the following new language as subsections (c), (d), (e), (f), (g), and (h):

(c) "Telecommunications Service Provider" means any Incumbent Local Exchange Telephone Company or certificated individual or entity, or individual or entity operating pursuant to the approval by the commission of a franchise within Section 6 of this act, authorized by law to provide, and offering or providing for hire, any telecommunications service, telephone service, telegraph service, paging service, or communications service similar to such services unless otherwise exempted from this definition by state or federal law.

(d) "Incumbent Local Exchange Telephone Company" means a public utility offering and providing Basic Local Exchange Telephone Service as defined by Section 65-5-208 pursuant to tariffs approved by the Commission prior to the effective date of this act.

(e) "Competing Telecommunications Service Provider" means any individual or entity that offers or provides any two-way communications service, telephone service, telegraph service, paging service, or communications service similar to such services and is certificated as a provider of such services after the effective date of this act unless otherwise exempted from this definition by state or federal law.

(f) "Interconnection Services" means telecommunications services, including intrastate switched access service, that allow a Telecommunications Service Provider to interconnect with the networks of all other Telecommunications Service Providers.

(g) "Current Authorized Fair Rate of Return" means:

(1) for an Incumbent Local Exchange Telephone Company operating pursuant to a regulatory reform plan ordered by the Commission under TPSC Rule 1220-4-2-.55, any return within the range contemplated by Section 1220-4-2-.55 (1)(c)(1) or 1220-4-2-.55 (d);

(2) for any other Incumbent Local Exchange Telephone Company, the rate of return on rate base most recently used by the Commission in an order evaluating its rates.

(h) "Gross Domestic Product-Price Index (GDP-PI)" used to determine limits on rate changes means the final estimate of the Chain-Weighted Gross Domestic Product-Price Index as prepared by the U.S. Department of Commerce and published in the Survey of Current Business, or its successor.

SECTION 4. Tennessee Code Annotated, Title 65, Chapter 5, Part 2, is amended by adding the following new language:

Section 65-5-207. Universal Service.

(a) Universal service, consisting of residential Basic Local Exchange Telephone Service at affordable rates and carrier-of-last-resort obligations must be maintained after the local telecommunications markets are opened to competition. In order to ensure the availability of affordable residential Basic Local Exchange Telephone Service, the Commission shall formulate policies, promulgate rules and issue orders which require all Telecommunications Service Providers to contribute to the support of universal service.

(b) The Commission shall, within thirty (30) days of the effective date of this act, initiate a generic contested case proceeding to determine the cost of providing universal service, determine all current sources of support for universal service and their associated amounts, identify and assess alternative universal service support mechanisms, and determine the need and timetable for modifying current universal service support mechanisms and implementing alternative universal service support mechanisms. The Commission shall issue its decision in the universal service proceeding prior to January 1, 1996.

(c) The Commission shall create an alternative universal service support mechanism that replaces current sources of universal service support only if it determines that the alternative will preserve universal service, protect consumer welfare, be fair to all Telecommunications Service Providers, and prevent the unwarranted subsidization of any Telecommunications Service Provider's rates by consumers or by another Telecommunications Service Provider. To accomplish these objectives, the Commission, if it creates or subsequently modifies an alternative universal service support mechanism, shall:

(1) restrict recovery from the mechanism by any Telecommunications

(2) consider provision of universal service by Incumbent Local Exchange Telephone Companies and by other Telecommunications Service Providers;

(3) order only such contributions to the universal service support mechanism as are necessary to support universal service, and fund administration of the mechanism;

(4) administer the universal service support mechanism in a competitively neutral manner, and in accordance with established Commission rules and federal statutes;

(5) determine the financial effect on each universal service provider caused by the creation or a modification of the universal service support mechanism, and rebalance the effect through a one-time adjustment of equal amount to the rates of that provider;

(6) when ordering a modification, include changes in the cost of providing universal service in the rebalancing required by subsection (5);

(7) when performing its duties under subsections (5) and (6), order no increase in the rates for any Interconnection Services; and

(8) consider, at a minimum:

(i) the amount by which the embedded cost of providing residential Basic Local Exchange Telephone Service exceeds the revenue received from the service, including the cost of the carrier-of-last-resort obligation, for both high- and low-density service areas;

(ii) the extent to which rates for residential Basic Local Exchange Telephone Service should be required to meet the standards of Section 65-5-208(c);

(iii) intrastate access rates and the appropriateness of such rates as a significant source of universal service support.

(d) The commission shall monitor the continued functioning of universal service mechanisms and shall conduct investigations, issue show cause orders, entertain petitions or complaints, or adopt rules in order to assure that the universal service mechanism is modified and enforced in accordance with the criteria set forth in this section.

(e) Nothing in this section shall be construed to require the commission to raise residential Basic Local Exchange Telephone Service rates.

SECTION 5. Tennessee Code Annotated, Section 65-4-203, is amended by adding the following new subsection (c):

(c) The provisions of this Section shall not apply to Telecommunications Service Providers.

SECTION 6. Tennessee Code Annotated, Section 65-4-207, is amended by designating the existing language as subsection (a) and by adding the following new subsection (b):

(b) The provisions of this section shall not apply to Telecommunications Service Providers; provided, however, this section shall continue to apply with respect to any ordinance adopted, and any franchise granted pursuant to such an ordinance, prior to the effective date of this act.

SECTION 7. Tennessee Code Annotated, Section 65-4-201, is amended by designating the existing language as subsection (a) and by adding new subsections (b), (c) and (d) as follows:

certificate of convenience and necessity for such service or territory; provided, however, that no Telecommunications Services Provider offering and providing a Telecommunications Service under the authority of the Commission on the effective date of this act shall be required to obtain additional authority in order to continue to offer and provide such Telecommunications Services as it offers and provides as of such effective date.

(c) After notice to the Incumbent Local Exchange Telephone Company and other interested parties and following a hearing, the Commission shall grant a certificate of convenience and necessity to a Competing Telecommunications Service Provider if after examining the evidence presented, the Commission finds:

(i) The applicant has demonstrated that it will adhere to all applicable Commission policies, rules and orders; and

(ii) The applicant possesses sufficient managerial, financial and technical abilities to provide the applied for services.

A Commission order, including appropriate findings of fact and conclusions of law, denying or approving, with or without modification, an application for certification of a Competing Telecommunications Service Provider shall be entered no more than sixty (60) days from the filing of the application.

(d) Subsection (c) shall not be applicable to areas served by an Incumbent Local Exchange Telephone Company with fewer than 100,000 total access lines in this state unless such company voluntarily enters into an interconnection agreement with a Competing Telecommunications Service Provider or unless such Incumbent Local Exchange Telephone Company applies for a certificate to provide telecommunications services in an area outside its service area existing on the effective date of this act.

SECTION 8. Tennessee Code Annotated, Title 65, Chapter 4, is amended by adding the following as a new appropriately designated section:

Section 65-4-_____. Administrative Rules.

(a) All Telecommunications Services Providers shall provide non-discriminatory interconnection to their public networks under reasonable terms and conditions; and all Telecommunications Services Providers shall, to the extent that it is technically and financially feasible, be provided desired features, functions and services promptly, and on an unbundled and non-discriminatory basis from all other Telecommunications Services Providers.

(b) Prior to January 1, 1996, the Commission shall, at a minimum, promulgate rules and issue such orders as necessary to implement the requirements of subsection (a) and to provide for unbundling of service elements and functions, terms for resale, interLATA presubscription, number portability, and packaging of a Basic Local Exchange Telephone Service or unbundled features or functions with services of other providers.

These rules shall also ensure that all Telecommunications Services Providers who provide Basic Local Exchange Telephone Service or its equivalent provide each customer a basic White Pages directory listing, provide access to 911 Emergency Services, provide free blocking service for 900/976 type services, provide access to Telecommunications Relay Services, provide Lifeline and Link-Up Tennessee services to qualifying citizens of the state and provide educational discounts existing on the effective date of this act.

(c) The granting of applications for certificates of convenience and necessity to Competing Telecommunications Service Providers or the adoption of a price regulation plan for Incumbent Local Exchange Telephone Companies shall not be dependent upon the promulgation of these rules.

Section 65-5-208. Competitive Rules.

(a) Services of Incumbent Local Exchange Telephone Companies who apply for price regulation under Section 65-5-209 shall be classified as follows:

1. "Basic Local Exchange Telephone Services" are telecommunications services which are comprised of an access line, dial tone, touch-tone and usage provided to the premises for the provision of two way switched voice or data transmission over voice grade facilities of residential customers or business customers within a local calling area, Lifeline, Link-Up Tennessee, 911 Emergency Services and educational discounts existing on the effective date of this act or other services required by state or federal statute. These services shall, at a minimum, be provided at the same level of quality as is being provided on the effective date of this act. Rates for these services shall include both recurring and nonrecurring charges.

2. "Non-Basic Services" are telecommunications services which are not defined as Basic Local Exchange Telephone Services and are not exempted under subsection (b). Rates for these services shall include both recurring and nonrecurring charges.

(b) The Commission, after notice and opportunity for hearing, may find that the public interest and the policies set forth herein are served by exempting a service or group of services from all or a portion of the requirements of this part. Upon making such a finding, the Commission may exempt Telecommunications Service Providers from such requirements as appropriate. The Commission shall in any event exempt a telecommunications service for which existing and potential competition is an effective regulator of the price of those services.

(c) Effective January 1, 1996, an Incumbent Local Exchange Telephone Company shall adhere to a price floor for its competitive services subject to such determination as the Commission shall make pursuant to Section 65-5-207. The price floor shall equal the Incumbent Local Exchange Telephone Company's tariffed rates for essential elements utilized by Competing Telecommunications Service Providers plus the total long-run incremental cost of the competitive elements of the service. When shown to be in the public interest, the Commission shall exempt a service or group of services provided by an Incumbent Local Exchange Telephone Company from the requirement of the price floor. The Commission shall, as appropriate, also adopt other rules or issue orders to prohibit cross-subsidization, preferences to competitive services or affiliated entities, predatory pricing, price squeezing, price discrimination, tying arrangements or other anti-competitive practices.

(d) The maximum rate for any new Non-Basic Service first offered after the effective date of this act shall not exceed the stand alone cost of the service.

SECTION 10. Tennessee Code Annotated, Title 65, Chapter 5, Part 2, is amended by adding the following new language as:

Section 65-5-209. Price Regulation Plan.

(a) Rates for telecommunications services are just and reasonable when they are determined to be affordable as set forth in this Section. Using the procedures established in this section, the Commission shall ensure that rates for all Basic Local Exchange Telephone Services and Non-Basic Services are affordable on the effective date of price regulation for each Incumbent Local Exchange Telephone Company.

(b) An Incumbent Local Exchange Telephone Company shall, upon approval of its application under subsection (c), be empowered to, and shall charge and collect only such rates that are less than or equal to the maximum permitted by this section and subject to the safeguards in Section 65-5-208 (c) and (d) and the non-discrimination provisions of this Title.

(c) The Commission shall enter an order within ninety (90) days of the

Telephone Services and Non-Basic Services as defined in Section 65-5-208 are deemed affordable if the Incumbent Local Exchange Telephone Company's earned rate of return on its most recent TPSC 3.01 report as audited by the Commission staff pursuant to subsection (j) is equal to or less than the Company's Current Authorized Fair Rate of Return existing at the time of the Company's application. If the Incumbent Local Exchange Telephone Company's earned rate of return on its most recent TPSC 3.01 report as audited by the Commission staff pursuant to subsection (j) is greater than the Company's Current Authorized Fair Rate of Return, the Commission shall initiate a contested, evidentiary proceeding to establish the initial rates on which the price regulation plan is based. The Commission shall initiate such a rate-setting proceeding to determine a fair rate of return on the Company's rate base using the actual intrastate operating revenues, expenses, rate base and capital structure from the Company's most recent TPSC 3.01 report as audited by the Commission staff pursuant to subsection (j). If the Incumbent Local Exchange Telephone Company's earned rate of return is less than its Current Authorized Fair Rate of Return, the Company may request the Commission to initiate a contested, evidentiary proceeding to establish the initial rates upon which the price regulation plan is based. Upon request by the Incumbent Local Exchange Telephone Company, the Commission shall initiate such a contested, evidentiary proceeding using the same rate-setting procedures described above. Rates established pursuant to the above process shall be the initial rates on which a price regulation plan is based, subject to such further adjustment as may be made by the Commission pursuant to Section 65-5-207.

(d) If not resolved by agreement, the Commission shall, on petition of the Competing Telecommunications Services Provider, hold a contested case proceeding within thirty (30) days to establish initial rates for new interconnection services provided by an Incumbent Local Exchange Telephone Company subsequent to the effective date of this act, which rates shall be set in accordance with the provisions set forth in this act. The Commission shall issue a final order within twenty (20) days of the proceeding.

(e) A price regulation plan shall maintain affordable Basic and Non-Basic rates by permitting a maximum annual adjustment that is capped at the lesser of one-half (1/2) the percentage change in inflation for the United States using the Gross Domestic Product-Price Index (GDP-PI) from the preceding year as the measure of inflation, or the GDP-PI from the preceding year minus two (2) percentage points. An Incumbent Local Exchange Telephone Company may adjust its rates for Basic Local Exchange Telephone Services or Non-Basic Services only so long as its aggregate revenues for Basic Local Exchange Telephone Services or Non-Basic Services generated by such changes do not exceed the aggregate revenues generated by the maximum rates permitted by the price regulation plan.

(f) Notwithstanding the annual adjustments permitted in subsection (e), the initial Basic Local Exchange Telephone Service rates of an Incumbent Local Exchange Telephone Company subject to price regulation shall not increase for a period of four (4) years from the date the Incumbent Local Exchange Telephone Company becomes subject to such regulation. At the expiration of the four (4) year period, an Incumbent Local Exchange Telephone Company shall be permitted to adjust annually its rates for Basic Local Exchange Telephone Services in accordance with the method set forth in subsection (e) provided that in no event shall the rate for residential Basic Local Exchange Telephone Service be increased in any one (1) year by more than the percentage change in inflation for the United States using the Gross Domestic Product-Price Index (GDP-PI) from the preceding year as the measure of inflation.

(g) Notwithstanding any other provision of this act, a price regulation plan shall permit a maximum annual adjustment in the rates for Interconnection Services that is capped at the lesser of one-half (1/2) the percentage change in inflation for the United States using the Gross Domestic Product-Price Index (GDP-PI) from the preceding year as the measure of inflation, or the GDP-PI from the preceding year minus two (2) percentage points. An Incumbent Local Exchange Telephone Company may adjust its rates for Interconnection Services only so long as its aggregate revenues generated by such changes do not exceed the aggregate revenues generated by the maximum rates permitted by this subsection, provided that each new rate must comply with the requirements of Section 65-5-208 and the non-discrimination provisions of this Title.